

1995

# State of Utah v. Shane Doyle : Reply Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,

Plaintiff/Appellee,

vs.

SHANE DOYLE,

Defendant/Appellant.

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Case No. 950383-CA

Priority No. 2

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ITS DENIAL OF DOYLE'S  
MOTION TO SUPPRESS BECAUSE THE EVIDENCE IN THE AFFIDAVIT  
WAS INSUFFICIENT TO SUPPORT A FINDING OF PROBABLE CAUSE

After the filing of Appellant's brief, this Court addressed the constitutionality of "general" warrants in State v. Covington, 274 Utah Adv. Rep. 22 (Utah App. 9/28/95). In Covington, this Court recognized that as a general rule, "open-ended or general warrants are constitutionally prohibited." Covington, 274 Utah Adv. Rep. at 23 (citing Ybarra v. Illinois, 44 U.S. 85, 92 n.4, 100 S.Ct. 338, 342 n.4 (1979)).<sup>1</sup>

However, this Court further stated that the validity of "all persons present" search warrants--as was issued in the case at hand--would depend upon the evidence supporting the probable

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<sup>1</sup>The holding in Covington is based solely upon Fourth Amendment grounds. Doyle argues that both this Court should examine the issue in this case under both the state and federal constitutions. Contrary to the State's assertion of waiver, Article I, § 14 of the Utah Constitution is, in fact, the central focus of Doyle's argument both on appeal and in the trial court.

cause for their issuance. Covington, 274 Utah Adv. Rep. at 23. This "probable cause" required for the issuance of an "all persons present" warrant is that "there is good reason to suspect or believe that anyone present at the anticipated scene will probably be a participant" to the illegal conduct." Covington, 274 Utah Adv. Rep. at 24 (quoting State v. DeSimone, 288 A.2d 849, 850 (N.J. 1972)).

Doyle maintains that, under Covington, the evidence in the affidavit supporting the issuance of the "all persons present" warrant executed in this case is insufficient to support the necessary finding of probable cause that anyone present at the Hundley's trailer would be involved in illegal drug trafficking. Therefore, Doyle asserts that the warrant in this case is unconstitutionally overbroad.

#### **A. Standard of Review**

Doyle argues that this Court should review the trial court's legal conclusion that the authority granting paragraph in the warrant was neither too broad nor vague for "correctness." The State, however, maintains that appellate courts should be subjected to the same deferential standard of review that a trial court is bound by in its review of a magistrate's determination of probable cause (Br. of Appellee at 10 (citations omitted)).

Although this Court in Covington analyzed the validity of an "all persons present" in terms of whether probable cause had been established by the affidavit, this court never explicitly stated the standard of review to be employed in such an analysis.

However, this Court, in its analysis of how other jurisdictions have addressed the issue of "general warrants," did note that the Massachusetts Supreme Court "emphasized that an affidavit in support of a warrant seeking to authorize a search of any person present must be strictly scrutinized." Covington, 274 Utah Adv. Rep. at 24. Moreover, this Court in Covington appears to have engaged in a de novo review of whether the facts alleged in the affidavit were sufficient to support a finding of probable cause: "We conclude that the affidavit in this case establishes probable cause to search all persons present at the basement apartment. We therefore affirm the trial court's denial of defendant's motion to suppress and affirm his conviction." Covington, 274 Utah Adv. Rep. at 25.

Therefore, Doyle requests that this Court "strictly scrutinize" the affidavit in this case and conclude that the facts alleged in the affidavit are insufficient to establish probable cause to search all persons present at the Hundley's residence.

**B. The Affidavit, upon which the Search Warrant in this Case Issued, is Insufficient to Support the Finding of Probable Cause Necessary to the Issuance of an "All Persons Present" Warrant**

In State v. Covington, 274 Utah Adv. Rep. 22 (Utah App. 9/28/95), this Court upheld the validity of an "all persons present" search warrant and affirmed the trial court's denial of defendant's motion to suppress because the underlying affidavit established probable cause that anyone present at the apartment

would probably be a participant in illegal drug activity.<sup>2</sup>

Doyle asserts that the factual allegations in the affidavit in this case, unlike that in Covington, are insufficient to establish probable cause for an "all persons present" search warrant; and therefore, this Court should reverse the trial court's denial of his motion to suppress and vacate his conviction.

The affidavit in Covington indicates that the police received information from several individuals that drug trafficking was taking place at a basement apartment located at 479 South 100 East, Pleasant Grove: Rachel Anderson, who was arrested for possession of methamphetamine on the day the search warrant was issued told officers that she stole the drugs from her supplier, Rick Close, who lived in a basement apartment at 479 South 100 East, Pleasant Grove. Covington, 274 Utah Adv. Rep. at 24. Three separate sources had provided officers with tips that Close had been selling methamphetamine with the past

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<sup>2</sup>The warrant in Covington authorized the search of "[t]he downstairs apartment and the person of all individuals present at 479 South 100 East, Pleasant Grove [for] narcotics and other evidence of trafficking...." Covington, 274 Utah Adv. Rep. at 23. When the officer's arrived at the residence they found the defendant, Stacey Covington, standing between the door to the apartment and a truck, parked approximately eight to ten feet away from the door. Id. One officer took custody of Covington, ordered him to lie down on the ground, frisked him and then after the apartment had been secured took him inside, stood him next to the other suspects, searched his person, removed from his person a marijuana pipe and a package of cigarettes which contained marijuana, and finally arrested him. Id. At the Pleasant Grove Police Department methamphetamine was found on Covington's person. Id. Covington subsequently pled guilty to two charges conditioned upon his right to appeal the trial court's denial of his motion to suppress. Id.



three weeks. Id. at 25. Finally, NET officers had been receiving tips from numerous sources that controlled substances were being sold from the 479 South 100 East residence for a year prior to the issuance of the warrant.

In Doyle's case, however, the only information or "tips" received by the Provo Police Department were: One, from an anonymous caller six weeks before the search warrant issued who said that Steven and Angela Hundley were using and selling cocaine; that their address was 255 N. 1600 W. #121, Provo, Utah; and that Steven Hundley was "dealing heavily" at his place of employment, Mountain States Steel (R. 28). Two, from a confidential informant who told an officer that Steven Hundley was selling cocaine (R. 28).

In addition, the affidavit in Covington detailed numerous police observations and activities which supported both the accuracy of the "tips" they had received as well as probable cause that all persons present at the apartment were likely to be involved in drug trafficking. For example, the officers checked the criminal histories of both Rachel Anderson and Rick Close and discovered that they both had a history of controlled substance violations. Covington, 274 Utah Adv. Rep. at 24-25. Officers had also recently searched Close's vehicle and found drug paraphernalia. Id. at 25. In addition, officers had conducted surveillance of the building at various times during the six months previous to the warrant's issuance and had arrested people residing in the building and had found paraphernalia and

controlled substances. Id. Finally, officers had observed the purchase of narcotics from the house by Darcy McDonald, who was subsequently arrested and charged with a controlled substance violation. Id.

On the other hand, in Doyle's case the officers engaged in no such surveillance. There are no facts in the affidavit which indicate that officers had observed any illegal activities at the Hundley's residence. The only related activity prior to the issuance of the warrant which the officers engaged in was to seize and search the Hundley's garbage can wherein drug paraphernalia, marijuana leaves and stems, and a piece of paper with Steven and Angela Hundley's names and address were found (R. 28). However, there was no evidence found by the officers to support the belief of widespread criminal activity which would justify the issuance of an "all persons present" warrant.

Furthermore, all of the cases cited to by this Court in Covington in which "all persons present" warrants were validly issued, can be distinguished from Doyle's case.<sup>3</sup> In each of these cases the affidavits in support of the "general" warrant contained corroborated information of wide-spread illegal conduct from knowledgeable sources in addition to substantial police observation and surveillance of extensive illegal activities. In

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<sup>3</sup>Commonwealth v. Smith, 348 N.E.2d 101 (Mass.), cert. denied, 492 U.S. 944, 97 S.Ct. 364 (1976); Commonwealth v. Heidelberg, 535 A.2d 611 (Pa. Super. Ct. 1987); State ex rel. L.Q., 566 A.2d 223 (N.J. Super. Ct. App. Div. 1989), cert. denied, 584 A.2d 199 (N.J. 1990); and People v. Johnson, 805 P.2d 1156 (Colo. Ct. App. 1990).

Doyle's case, there was no surveillance from police and the only information came from one anonymous caller and a confidential informant.

The rest of the factual allegations contained in the affidavit in Doyle's case are merely the unsupported opinion of the affiant and are insufficient to support a conclusion of probable cause for an "all persons present" warrant:

The fourth amendment requires that when a search warrant is issued on the basis of an affidavit, that affidavit must contain specific facts sufficient to support a determination by a neutral magistrate that probable cause exists. The affiant must articulate particularized facts and circumstances leading to a conclusion that probable cause exists. Mere conclusory statements will not suffice.

State v. Babbell, 770 P.2d 987, \_\_\_\_ (Utah 1989) (citations omitted). Neither the fact that methamphetamine users often become violent, nor that evidence would likely be overlooked if officers failed to search the curtilage of the residence or vehicles located thereon, support a probable cause determination that "all persons present" are likely to be involved in illegal activities (R. 27). Moreover, the affiant's opinion that most of the people who use controlled substances "also occasionally sell" is mere speculation unsupported by particular facts or circumstances.

Doyle requests that this Court--like the Minnesota court in State v. Anderson, 415 N.W.2d 57 (Minn. App. 1987), a case analyzed by Doyle in Appellant's Brief pgs. 13-15--find that the factual allegations in the affidavit in this case, unlike that in Covington, are insufficient to establish probable cause for an

"all persons present" search warrant; and that therefore, the trial court's conclusion that the warrant's grant of authority was neither too broad nor vague was in error and that Doyle's conviction should accordingly be vacated with instructions to the trial court that evidence seized as a result of the unconstitutional warrant is to be suppressed.

## POINT II

### **THE WARRANT WAS UNCONSTITUTIONALLY EXECUTED**

If this Court finds that the "all persons present" warrant issued in this case is constitutionally valid on its face, Doyle requests that this Court find that the search of his person was beyond the scope of the warrant and unsupported by independent probable cause.

The warrant issued in this case authorized the search of "the person of any individuals present at the time of execution" (R. 24). Doyle maintains that he was not "present at the time of execution" and that therefore, the search of his person after his arrival was outside the scope of the warrant.

Doyle arrived at the Hundley's residence anywhere from 40 to 75 minutes after the officers' had begun execution of the warrant (R. 89, 115). Officer Shawn Adamson testified that when Doyle arrived, the Hundley's had been arrested and their child had been picked-up (R. 114). Officer Denton Johnston's police report states: "At the completion of the search warrant two other individuals arrived at the home. A Shane Doyle and Terri Olson arrived" (R. 90). It is clear that in the minds of at least some

of the officers, the search warrant had been executed by the time Doyle arrived.

This is an issue of first impression in Utah. In addition, Doyle has not found any other jurisdictions which have squarely addressed the issue at hand. However, the Minnesota Court of Appeals in State v. Anderson, 415 N.W.2d 57, 61 (Minn. App. 1987)--a case which held an "all persons present" warrant to be unconstitutional--noted that, "Another factor weighing in our decision is that respondent did not arrive on the premises immediately after the police did. Respondent arrived three hours later, as police were preparing to leave. Arguably, the warrant was no longer being executed when respondent entered the premises, although we do not rest our affirmance on this basis." Therefore, Doyle argues that the warrant as executed with regards to him was unconstitutional.

Doyle urges this Court to hold that a warrant authorizing the search of "the person of any individuals present at the time of execution" requires the presence of an individual when police begin the execution of the warrant--that "the time of execution" is the time the police begin their activities pursuant to the warrant.


Accordingly, Doyle requests that this Court find that the search of his person was outside the scope of the warrant, and that absent any evidence of independent and particularized probable cause, the search of his person was an unconstitutional violation of both the Fourth Amendment to the United States

Constitution and Article I, § 14 of the Utah Constitution.

**CONCLUSION AND PRECISE RELIEF SOUGHT**

Based upon the aforementioned arguments, this Court should find that the "all persons present" warrant executed in this case was unconstitutionally overbroad because its issuance was unsupported by probable cause. Alternatively, this Court should find that the search of Doyle's person was outside the scope of the warrant because he was not present "at the time of execution" and that the search of his person was not supported by independent probable cause. Regardless of the grounds, this Court should reverse the trial court's denial of Doyle's motion to suppress and remand the case to the Fourth District Court with directions to suppress the illegally obtained evidence and dismiss the charges.

RESPECTFULLY SUBMITTED this 20 day of December, 1995.

  
MARGARET P. LINDSAY  
Attorney for Doyle

**MAILING CERTIFICATE**

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing Reply Brief to Kenneth A. Bronston, Assistant Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, this 20 day of December, 1995.

